IN THE MATTER OF THE ARBITRATION BETWEEN

INDEPENDENT SCHOOL DISTRICT NO. 413 MARSHALL, MINNESOTA	)	**BMS NO. 07-PA-0137**
"EMPLOYER"	)	**DECISION AND AWARD**
And	)	
MARSHALL EDUCATION ASSOCIATION	)	**RICHARD R. ANDERSON ARBITRATOR**
"UNION"	)	**JUNE 22, 2007**

APPEARANCES

For the Employer:

Patrick J. Flynn, Attorney
Klint Willert, Superintendent of Schools
Bruce Lamprecht, Director of Business Services
Ron Reiber, Director of Activities

For the Union:

William F. Garber, Attorney
Gary Grabau, Grievant/Teacher
Jackie Baumgard, Education Minnesota Field Staff Representative
Todd E. Pack, President Marshall Education Association/Teacher
James L. Muchlinski, Counselor/Coach (Retired)

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on May 10, 2007 in Marshall, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on May 10, 2007. Post-Hearing Briefs were mailed by the Employer, hereinafter the School District, on June 15, 2007 and received on June 16, 2007, 2006. The record was then closed and the matter was taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from July 1, 2005 through June 30, 2007.[1] The language in Article XVI [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance. Section 7 Subs 6 and 8 of this establishes that the arbitrator is the sole decision maker in this matter and defines the jurisdiction of the arbitrator.

THE ISSUE

The parties stipulated that the issue was, "Whether the Employer violated the collective bargaining agreement when it failed to pay the Grievant, Gary Grabau, coaching pay for the spring of 2006, and if so, what is an appropriate remedy?

BACKGROUND

The School District is an independent public school district located in the city of Marshall, Minnesota. The Union, affiliated with Education Minnesota, represents all of

[1] Joint Exhibit No. 1

the School District's teachers. The bargaining unit, which consists of approximately 185 teachers, is set forth in Article II [Recognition of EXCLUSIVE REPRESENTATIVE]. The parties have a history of collective bargaining dating back to the early 1970's.

The Union, through President Todd Pack, filed a grievance on May 5, 2006 alleging that the Employer's failure to pay the Grievant for his coaching duties while he was out on sick leave violated the Agreement and Minnesota State Law. The Grievance form stated in part:[2]

> *Statement of the Grievance (include events/conditions of the grievance/persons responsible). This was the unprecedented termination of an assistant track coaching assignment for the 2005-06 school years while on sick leave after an illness. This termination was done without any written or verbal notice to Mr. Grabau at any time. To this date he has yet to receive any notice of his termination.*
>
> *Violation (contract provision, policy, rule, law, practice). Article XIII, Extra Compensation; subd. 1, subd. 2, subd 3.; Minnesota State Statute 122A.58, Coaches. Terminations of Duties and any other articles and/or statutes that may apply.*
>
> *Redress Sought: Compensation for coaching assignment while on sick leave*

The Employer, through Director of Activities Ron Reiber, answered the Union's grievance on May 18, 2006 as follows:

> *Disposition by Supervisor and Reasons Therefore:*
>
> *Reason--- I returned from vacation on March 20 and before school started Mike Jacobs came into my office and told me about Gary and the stroke he had. Mike said he had talked to Leo Geraets about filling in for Gary until he comes back from his stroke. I checked with Brian Jones on Gary's condition and it was very serious at that time (Gary had been transferred to Sioux Falls for critical care) so it was anticipated that the District needed someone for the entire year. I talked to Leo that morning and since he had just stepped down as the head girl's coach, he was the best qualified replacement we could have. I told him it probably would be for the entire year, since most situations of this nature takes*

[2] Joint Exhibit No. 2

time to recover. Leo stated that he was prepared to go the entire year if needed. I then sent the recommendation to the District Office and we replaced Gary's with Leo's

With Gary being incapacitated based on the information that I had received, I knew we had to replace Gary as assistant track coach. I didn't notify Gary of this, because the District had been told not to disturb Gary at the hospital due to his critical condition, and Gary's health was the most important thing at that time as he still was in very serious condition. Gary was not terminated; however due to his health condition, it was determined he was unable to coach the season. Furthermore, there are not sick leave provisions for coaching; without a sick leave provision and without a contract in force, it was deemed inappropriate to pay coaching services not rendered.

On June 26, 2006, the Union moved the grievance to the next level; and after the School Board denied the grievance, filed for arbitration with the State of Minnesota Bureau of Mediation Services (BMS).[3] The undersigned was notified of being selected as the neutral arbitrator by facsimile from the Union's Counsel dated February 12, 2007.

RELEVANT CONTRACT PROVISIONS

ARTICLE II. EXCLUSIVE REPRESENTATIVE

Section 1: MARSHALL EDUCATION ASSOCIATION TEACHERS: *In accordance with P.E.L.R.A., the School Board recognizes the Union as the exclusive representative of teachers employed by the School District, which exclusive representative shall have those rights as prescribed by the P.E.L.R.A. and as described in the provisions of this Agreement.*

Section 2: APPROPRIATE UNIT: *The Exclusive Representative shall represent all the teachers in the District as defined in this agreement and said act.*

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ARTICLE 1V. SCHOOL BOARD RIGHTS AND OBLIGATIONS

Section 1. INHERENT MANAGERIAL RIGHTS: *The exclusive representative recognizes that the School Board is not required to meet and negotiate on matters of inherent managerial policy, which includes, but is not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organization structure and selection and direction and number of personnel.*

[3] The exact dates of the aforementioned activites are unknown.

Section 2. MANAGERIAL RESPONSIBILITIES: *The Exclusive Representative recognizes the right and obligation of the School Board to efficiently manage and conduct the operation of the School District within its legal limitations and with its primary obligation to provide educational opportunities for the students of the School District.*

Section 3. EFFECTS OF LAWS, RULES AND REGULATIONS: *The Exclusive Representative recognizes that all employees covered by this agreement shall perform the teaching and other teacher-related services prescribed by the School Board and shall be governed by the laws of the State of Minnesota, and by School Board rules, regulations, directives and orders, issued by the properly designated officials of the School District. The exclusive representative also recognizes the right, obligations and duty of the School Board and its duly designated officials to promulgate rules, regulations, directives and orders insofar as such rules, regulations, directives and orders are not inconsistent with the terms of this agreement and recognizes that the School Board, all employees covered by this agreement, and all provisions of this agreement are subject to the laws of the State of Minnesota, federal laws, rules and regulations of the State Board of Education, and valid rules, regulations and orders of the state and federal governmental agencies. Any provision of this agreement found to be in violation of any such laws, rules, and regulations, directives or orders shall be null and void and without force and effect.*

Section 4. RIGHTS RESERVED: *The School Board has been granted by the State Legislature the power to manage and control the School District. The School Board reserves these delegated powers to itself, except as they may be expressly limited by this agreement.*

ARTICLE VIII: LEAVES OF ABSENCE

SECTION 1.SICK LEAVE. *Teachers shall be entitled to sick leave as defined below:*

Subd. 1. *Each full-time teacher shall be granted seven (7) days at the beginning of the school year and one additional day after each month (total of 15 days annually) of employment at full salary for leave to be used to cover absences caused by personal illness or disability, including illness or disability caused or contributed to by pregnancy aid childbirth. Use of sick leave for purposes of elective, non-life threatening surgery shall require a recommendation from a medical physician. Exceptions may be given by the Superintendent upon request.*

ARTICLE XIII. EXTRA COMPENSATION

Section 1. Extra-Curricular:

Subd. 1. *A teacher will not ordinarily be assigned to the position of head coach in more than one activity.*

Subd. 2. *The District may make changes in extra curricular assignments on a seasonal basis in accordance to Minnesota statute 122A.58. No change in extra-curricular assignments will be made after April 1 for fall activities or after 30 calendar days following the end of the activity season for winter and spring activities for the next school year except by mutual consent. This shall not be interpreted to restrict the District from discontinuing a particular activity and thus discontinuing an assignment to that activity when the turnout of students at the end of the second full week of the season for that activity is below a reasonable number. (For athletic activities a reasonable number of participants per coaching assignment shall be between 10 and 25.) In the event that an activity is discontinued under this provision, the teacher will be compensated a pro rata salary for the weeks worked. If, after 30 days following the end of the activity season, a teacher chooses to voluntarily discontinue service as a head coach or as an activity leader in an activity with no assistants or when no teachers volunteer to accept an assignment to an activity, the School Board reserves the right to refuse to accept the notice of discontinuance and/or assign a qualified teacher to such an activity, provided:*

a. *such assignment is made at least sixty (60) calendar days prior to the start of the season. This timeframe may be altered in cases of emergency and/or if mutually agreed upon by the parties involved.*

b. *the activity is one that has sufficient student interest.*

c. *the activity is one that was offered the previous year.*

Subd. 3. *The payments for extra-curricular assignments shall be according to Extra-Curricular Compensation Schedule.*

a. Credit for coaching/activity directing shall be allowed for experience outside of Marshall Public Schools.

b. *Each person shall be paid as found on the table entitled* ***Extra Curricular Compensation (2005-2007)*** *based on the number of years of experience, up to a maximum of (10) ten years. Each person shall move up one step after each year of experience.*

ARTICLE XI. GRIEVANCE PROCEDURE

SECTION 1. Definition: Grievance means an allegation by a teacher or the Association resulting in a dispute between the teacher employee or the Association and the School Board as to the interpretation or application of any terms of this agreement.

SECTION 7. ARBITRATION:

Subd. 6: Decisions: *The decision of the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provided in the P.E.L.R.A. of 1971.*

Subd. 8: Jurisdiction: *The arbitrator shall have no power to alter the terms of this agreement. However, it is agreed that the arbitrator is empowered to include in any award financial reimbursement as judged to be proper.*

ARTICLE XVI. DURATION OF AGREEMENT

SECTION 4: ***Past Practice****: This agreement includes the complete understanding between the parties and specifically all the commitments of the School Board to the Association. Whatever past practices of the School Board may have been with respect to compensation, hours worked and conditions of employment, these practices are hereby acknowledged by the Association to have terminated and are no longer binding on the School Board upon execution of this agreement.*

OTHER RELEVENT DOCUMENTS

MINN. STAT. § 122A.58 COACHES, TERMINATION OF DUTIES.

SUBDIVISION 1. TERMINATION; HEARING. *Before a district terminates the coaching duties of an employee who is required to hold a license as an athletic coach from the commissioner of education, the district must notify' the employee in writing and state its reason for the proposed termination. Within 14 days of receiving this notification, the employee may request iii writing a hearing on the termination before the hoard. If a heating is requested, the board must hold a hearing within 25 days according to the hearing procedures specified in section 122A.40, subdivision 14, and the termination is final upon the order of the board after the hearing.*

Subd. 2. Final decision. *Within ten days after the hearing, the board must issue a written decision regarding the termination. If the board decides to terminate the employee's coaching duties, the decision must state the reason on which it is based and include findings of fact based upon competent evidence in the record. The board may terminate the employee's duties or not, as it sees fit, for any reason*

which is found to be true based on substantial and competent evidence in the record.

Subd. 3. Non-application of section. *This section shall not apply to the termination of coaching duties pursuant to a district transfer policy or as a result of the non-renewal or termination of the employee's contract or the employee's discharge, demotion or suspension pursuant to section l22A.40 or 122A.41. This section shall not apply to the termination of an employee's coaching duties before completing the probationary period of employment.*

FACTS

The Grievant is a long tenured licensed teacher of the School District. He has been a social studies teacher for approximately 32 years as well as a mentor coordinator for part of his tenure.[4] He has also been a licensed coach for approximately 30 years. He coached football for 25 years, baseball for six years and track for 29-30 years. He had been the head coach for approximately 17 years; however, at the time of the dispute herein, he was the assistant track coach.

The Grievant's duties included coaching the sprinters and relay runners, overseeing the warm-up exercises of the whole team and helping the head track coach with other tasks when his primary coaching duties were finished for the day. The 2006 track season was scheduled to begin on March 13th and end on June 10th at the conclusion of the State track meet. This amounted to 65-70 days of actual coaching for this season. Additionally, the Grievant would attend clinics and meetings, get equipment ready at the beginning of a season and put away equipment upon a season's completion. These additional duties would amount to approximately 40 extra hours of unpaid time or less than 5% of the total time the Grievant would spend in his assistant coaching duties.

[4] A mentor coordinator is the teacher responsible to orient new teachers concerning School District operations, and train, observe and support them in their efforts to provide quality education to the students.

On Tuesday March 14, 2006, which was the first day of practice for the 2006 track season, the Grievant testified that he was not feeling well.[5] He awoke at 2:30 a.m. with a severe headache and a tingling on his left side. He went into the local hospital emergency room and was thereafter airlifted to a hospital in Sioux Falls, South Dakota.[6] It was determined that the Grievant had suffered a minor stroke. Three days later, while still in the hospital, the Grievant suffered a major stroke. After three more weeks in the hospital, he was released. The second stroke caused the Grievant to experience a number of adverse symptoms including weakness on his left side, some memory loss, a loss of some motor skills and some difficulty in walking.

The Grievant further testified that his doctor recommended that he not return to teaching that year and to give up coaching permanently because it caused too much stress. As a result he resigned his coaching position. The Grievant could not remember the date but believed it was sometime in May 2006 that he submitted his written resignation.[7] The letter of resignation was not dated.

The Grievant used accrued sick leave and was paid for his teaching absence beginning on March 15, 2006 through the end of the 2005-2006 school year. He also received payment for two weeks (one payroll period) of his 13-week coaching contract for his coaching services for the 2006 track season.

Activities Director Ron Reiber testified that it was apparent that he needed to hire a substitute coach when the Grievant suffered his stoke and it could not be determined when he would be able to resume his coaching duties. Reiber further testified that he

[5] The track season officially began on March 13th; however, due to a snow storm practice was cancelled.
[6] It appears he was not transferred because of a medical problem; but rather, because of MRI equipment problems.
[7] At the request of the Arbitrator the School District furnished this letter after the Briefs were received. This letter is being marked as Employer Exhibit No. 3

never directly contacted the Grievant or his wife regarding the Grievant's possible return to coaching. He said he received an e-mail from interim High School Principal Brian Jones on March 15, 2006 at 8:15 a.m. that stated; "*Paige [the Grievant's wife] has asked that until they know more that everyone please respect their privacy so Gary can get some rest. She will let JoAnn know of any updates and JoAnn will keep everyone informed.*"[8] After it became apparent that the Grievant would not be returning anytime soon, he then hired Leo Geraets the former girl's head track coach as a substitute coach, with the understanding that he would replace the Grievant until his return. When the Grievant failed to return, Geraets coached and was paid for coaching the remainder of the track season.

Minn. Stat. § 122A.58 restricts the right of an employer, absent specific circumstances, to terminate a coach or a change of assignment within 30 days of the end of the previous season.[9] Article XIII, Subd. 2. also restricts the right of the School District to terminate a coach or a change of assignment within 30 days of the end of the previous season absent specific circumstances. Both the School District and Union witnesses, including the Grievant, testified that no termination or change of assignment letter was ever issued to the Grievant, either before or after his incapacitation.

Evidence adduced at the hearing disclosed that three employees had been paid their full coach's compensation even though they did not complete their respective athletic seasons. The Grievant testified that in the early to mid-1980's he missed the

[8] Employer Exhibit No. 2
[9] Joint Exhibit No. 3

last three weeks and one playoff game after injuring a disk in his back and was paid for the remainder of the season.

Jim Muchlinski, a retired counselor from 1967-1999 and coach from 1967-1997, testified that while he was the Assistant Basketball Coach he hurt his back on December 22, 1990.[10] He did not perform any counselor or coaching duties until the end of February 1991 and then just worked half days as a counselor with no coaching duties for an additional two weeks. He was paid for his two and one half month absence from coaching.[11] Finally, the grievant testified that Julie Kuecker, a Cross Country Coach, went on maternity leave in October of 2002 causing her to miss the last part of the season. She was paid for her coaching services while on maternity leave.

Union witnesses President Todd Pack and the Grievant testified that they were also aware that a Basketball Coach, Trent Sukalski, missed two to three weeks of coaching and was not paid. They further testified that they were not aware of the non-payment to Sukalski until they were gathering evidence during the investigation of the instant grievance.

Activities Direct Rieber, who is responsible for overseeing the athletic department including authority over the coaches, testified that during the course of the hearing School District Business Office personnel conducted a search of their payroll records and could not find any record of the absences of the Grievant in 1985 or Muchlinski during the 1990-1991 basketball season. Reiber testified that a limited record search was also done regarding payment or non-payment of coaches who could not fulfill

[10] It appears the injury was not work related.
[11] Union Exhibit No. 1

coaching assignments during his six-year tenure as Activities Director. The records did indicate that Kuecker missed four weeks and four days of coaching in the fall of 2002 and was paid, and that Sukalski missed approximately three to four weeks of his coaching assignment in 2004 and was not paid. Rieber also testified that during the record search it was discovered that Blaine Schnaible, a Baseball Coach, missed two weeks of his coaching assignment in the spring of 2006, and he was not paid.

Reiber further testified that it was his practice since becoming Activities Director six years ago to compensate a coach's absence for up to two weeks; and that if an absence exceeded two weeks, he would discuss the matter with the Director of Business Service Bruce Lamprecht and Superintendent Klint Willert. Lamprecht, who has been the Director of Business Services for the past 13 years, testified that it was his practice to pay the entire amount of the extra-curricular contract for absences of up to two weeks, and if absences exceeded two or more weeks, there would be no payment. Lamprecht further testified that this practice or policy was not in writing. Superintendent Willert, who has been in his position for the past three years, confirmed that when he began his current duties with the School District, he became aware of the two week payment policy; and as he put it, "galvanized it" during his administration. Willert further testified that he never discussed this practice or policy with the Union prior to the filing of the instant grievance. Union President Pack testified that the only discussion the Union had with the School District concerning a two-week payment policy was during the processing of the instant grievance. Pack testified the School District brought up the subject of a two-week payment while they were meeting in the final step before arbitration. Pack testified that he believed it was a School Board member who

indicated that the parties should negotiate a time limitation payment of two weeks for coaches who could not perform their coaching services. .

POSITION OF THE UNION

It is the Union's position that the School District violated the Agreement and past practice when it failed to compensate the Grievant for the entire track season when he suffered a stroke after the first day of track practice in the spring of 2006. The Union argues that the language of Article XIII, Sec 1, Subd. 2 clearly shows that the Grievant remained employed as a coach for the entire track season since he was never terminated. Under Article XIII and Minn. Stat. § 122A.58, the School District could have terminated his services as a coach because he was incapable of performing his duties. The School District did not terminate him because it did not want to put stress on the Grievant. This may be true, however, by not terminating the Grievant the School District must abide by its decision. Article XIII, Sec 1, Subd. 2 also allows the School District to make a change in extra-curricular assignments within 30 calendar days of the end of the previous season for spring activities, which it did not do. The result was the Grievant remained employed as a coach for the entire track season.

The Union further argues that past practice required the School District to pay the Grievant for the entire track season. Three previous coaches who missed part of their seasons were paid for the time lost. This included the Grievant, and thus, he was well aware of the practice. One of these situations occurred after current Activities Director Rieber was hired. The School District asserts that because it did not pay two coaches beyond two weeks, there was no consistency in practice; or if there was a practice, it was not to pay coaches for extended absences. One way to judge consistency is

mutuality of agreement. There was both mutuality and consistency in the three coaches that were paid, as both the Union and the School District were aware of the payment. There was no mutuality in the two coaches who were not paid since the Union did not know of this non-payment, one of whose non-payment only became known during the investigation of the instant grievance and the other during the hearing.

Further, the School District's argument that once Rieber became the Activities Director, he created a practice or policy of not paying for coach's absences that exceed two weeks. There are problems with this argument. It was not consistently applied. Kuecker was paid for the entire time of her absence, contrary to this alleged practice.

It also appears that the practice was concocted to fit the facts of the instant proceeding. One of the two coaches was out for three to four weeks and not paid for any lost time, which conformed to the School District's alleged practice. The other coach was out for two weeks and also was not paid for any lost time. According to Rieber's direct testimony, coaches are paid if they are out two weeks or less. Thus, the latter coach should have been paid. However, in cross-examination, Rieber testified that they are paid if they are out less than two weeks, thus justifying the lack of pay in this situation. Clearly, this waffling of testimony cannot be counted. As a result, three examples of past practice support the Grievant, one supported neither or both and the other supported the School District. Thus, any School District past practice argument cannot prevail.

The Union also argues that it is questionable whether Rieber had the authority to create any pay procedure. Exactly how or whether Rieber was authorized to make enforceable procedures on paying employees was never made clear. Rieber's alleged

two-week payment procedure preceded the current Superintendent, thus he never created it. There is no evidence that this alleged two week payment procedure was ever adopted by the School Board or by the parties. Also, no School District practice or procedure was established since the Union was unaware of the non-payment to the two coaches.

Finally, the Union argues that the broad language of the sick leave provisions of Article VIII Sec. 1, Subd. of the Agreement makes it applicable to coaches. This provision states, "*Each full-time teacher shall be granted seven (7) days at the beginning of the school year and one additional day after each month (total of 15 days annually) of employment at full salary for leave to be used to cover absences caused by personal illness or disability, including illness or disability caused or contributed to by pregnancy and childbirth.*" There is nothing in this provision that restricts the use of sick leave solely for teaching duties.

POSITION OF THE EMPLOYER

The School District's position is that it was not obligated to compensate the Grievant for coaching services that he was unable to perform because he had suffered a stroke. The Employer argues that it did not violate Article XIII, Sec. 1, Subd. 2. or Minn. Stat. § 122A.58. The School District acknowledges it is prohibited from terminating the Grievant's coaching duties or changing his coaching assignment once 30 days had elapsed following the end of that activity for the previous year. The School District transfer/termination rights for the 2006 spring track season would have expired on or about July 1, 2005. The limitation placed on the School District by this Agreement provision is clear and undisputed. The facts are equally clear that the School District

made no change to the Grievant's assignment and his position continued for the 2006 track season. Rather, the Grievant was unable to perform his coaching duties because of his debilitating condition, not because of any action on the part of the School District. This resulted in a substitute coach being placed in the Grievant's position pending the Grievant's ability to return. When the Grievant was unable to return, the substitute coach performed the duties of Assistant Track Coach and was paid the full contract amount for his services. Thus, The School District did not terminate or change the Grievant's coaching assignment for the spring of 2006. Rather, the Grievant, through no fault of his own, was unable to fulfill his coaching assignment and the School District is not required to compensate the Grievant for services he did not perform.

The Employer further argues that the School District did not violate past practice when it refused to pay the Grievant for coaching services that he did not complete. The following criteria are generally accepted as the standard for determining whether a past practice has been established by the party asserting the existence of a past practice. The following standards are consistent with the standard adopted by the Minnesota Supreme Court, which states in pertinent part as follows:

> *[P]rior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances, found in while using somewhat different language, essentially are compatible and consistent. [See Ramsey County v. American Fed'n of State, County and Mun. Employees~ Council 91, Local 8, 309 N.W.2d 785, 788, n. 3 (Minn. 1981).]*

The first standard states as follows:

> *"Past practice has been defined as "a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances." Certain qualities distinguish a*

binding past practice from a course of conduct that has no particular evidentiary significance:

(1) clarity and consistency
(2) longevity and repetition
(3) acceptability
(4) a consideration of the underlying circumstances

The second standard is found at Elkouri & Elkouri, How Arbitration Works, 608-609 (6th Ed.) (2003), which states as follows:

In the absence of a written agreement, "past practice", to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.

Another commonly used formulation requires "clarity, consistency, and acceptability." The term "consistency" involves the element of repetition, and "acceptability" speaks to "mutuality" in the custom or practice.

The evidence presented at the hearing provides no clarity regarding any purported past practice. Neither party asserted that the evidence surrounding payment or non-payment for extra-curricular activity services not performed was complete or even representative of extra-curricular assignments for periods of absences. The School District acknowledged that it had not searched its entire records, which would have required hundreds of hours to review each personnel file, a task the School district did not believe it was required to do.[12]

The School District further argues that the evidence presented at the hearing also did not establish a reasonable support for establishing longevity and repetition of the purported past practice. Director of Business Services Lamprecht testified that during his 13 years of service it was his policy to provide coaches' pay for services not

[12] The School District would have had to examine each individual teacher's payroll record to determine whether they were paid or not paid for absences since separate records are not kept which delineate coaching pay solely.

performed only up to two weeks and a reduction in compensation thereafter. The Union's sole evidence during this period consists of one situation, that of Kuecker receiving pay contrary to this procedure. The School District meanwhile presented three instances contrary to the Union's purported past practice argument, all occurring after an apparent aberration involving Kuecker.[13]

The School District also argues that under the Union's argument, the School District would be forced to pay two employees for the performance of one position. In addition, the circumstances surrounding the payment to the Grievant in mid-1980 and the payment to Mr. Muchlinski and Ms. Kuecker are different than the circumstances of the Grievant in this matter. All three performed a significant portion of their contract services while the Grievant only provided one day of service in an approximate 70-day season.

Finally, the School District argues that not only did the Union fail to establish a past practice argument in support of its position; it is also asking the Arbitrator to act contrary to the terms of the Agreement. The provisions of the Agreement referred to are as follows. First, Article XVI, Section 7, Subd. 8, provides as follows:

> **Subd. 8, Jurisdiction**. *The arbitrator shall have no power to alter the terms of this agreement. However, it is agreed that the arbitrator is empowered to include in any award such financial reimbursement as judged to be proper.*

Second, Article XVII, Section 4 states:

> **Section 4: Past Practice:** *This agreement includes the complete understanding between the parties and specifically all the commitments of the School Board to the Association. Whatever past practices of the School Board may have been with respect to compensation, hours worked and conditions of employment, these practices are hereby acknowledged by the Association to have terminated*

[13] The School District is including the non-payment to the Grievant in this group.

and are no longer binding on the School Board upon execution of this agreement.

It is clear that the jurisdiction of the Arbitrator does not extend to altering the terms of this agreement. In addition, the Agreement contains a zipper clause, which not only specifically refers to past practice, but also is titled "Past Practice." The clause clearly states that the parties agree to be governed pursuant to the terms and conditions of the collective bargaining agreement and terminate any obligations or rights arising out of past practices.

Specifically, even if a past practice had been established by the Union, the enforcement of a past practice would be expressly contrary to the agreement of the parties. In order to find for the Grievant, the Arbitrator would be required to alter his jurisdiction under Article XVI, Section 7, Subd. 8, and ignore the express agreement of the parties found at Article XVII, Section 4.

OPINION

The issue before the undersigned is whether the Grievant was entitled to pay through the provisions of the Agreement or in accordance with past practice. The Union, contrary to the School District, asserts that the Grievant was terminated as a coach and/or had his coaching assignment changed in violation of Article XIII, Sec 1, Subd. 2 of the Agreement and Minnesota Statute Section 122A.58. There is no evidence of this assertion. All the evidence clearly demonstrates that the Grievant, rather than being terminated/reassigned, was not paid beyond two weeks or the first payroll period of the track season after he had a debilitating stoke that occurred after the

first day of track practice. The only evidence that the Grievant's employment changed after his stroke was his tendered resignation in May 2006.

The Union, contrary to the School District, also asserts that the Grievant should have been paid for the entire track season pursuant to past practice. There is evidence in favor of the Union that there was a past practice history from at least 1985 when the Grievant was paid for a coaching absence in excess of two weeks through 2002 when Julie Kuecker was paid for a coaching absence in excess of four weeks. The School District's argument that there is no established past practice by the fact that since 2002 two coaches, who were absent two weeks and three to four weeks respectively, did not receive coaching pay for their absences is weak at best. There is no evidence that the Union was even aware of these situations until it began an investigation of the instant grievance in one situation, and not until the day of the hearing in the other.

The School District avers that it had a two-week payment procedure at least since Director of Business Services Bruce Lamprecht was hired in 1994. There is no evidence that any such policy or procedure existed before 1994. There is also no evidence of the basis or authority of Lamprecht to establish this policy or procedure or whether the policy or procedure was ever adopted by the School Board. Further, there is no evidence this policy or procedure was the product of negotiations. Finally, there is no evidence that it has ever been reduced to writing or disseminated to the extra-curricular teachers much less the Union.

The Union has established its past practice argument concerning payment to extra-curricular teachers including coaches for services not performed. It is uncontroverted that coaches, albeit only three, were paid for time absent from at least 1985 through

2002. There is no evidence adduced to show that any coach was not paid during this time frame. While subsequent to 2002, two coaches, three including the Grievant, were not paid for the reasons set forth above, this does not mitigate against the Union's past practice argument. Neither does the alleged two-week payment policy or procedure, as advanced by the School District, for the reasons also set forth above.

While the Union has prevailed in its past practice argument, it is nevertheless estopped from asserting it. The Union negotiated and is bound by the provisions of Article XVI, Section 7, Subd. 8, governing this Arbitrator's jurisdiction and the express agreement of the parties found at Article XVII, Section 4 wherein this "zipper clause" renders all past practice that existed at the time of the execution of the Agreement null and void unless they were encompassed in other provisions within the Agreement.

The remaining issue to be decided is whether the Grievant was entitled to pay during his absence pursuant to Article VIII Sec. 1, Subd. of the Agreement which states, "*Each full-time teacher shall be granted seven (7) days at the beginning of the school year and one additional day after each month (total of 15 days annually) of employment at full salary for leave to be used to cover absences caused by personal illness or disability, including illness or disability caused or contributed to by pregnancy aid childbirth.*" This provision grants full-time teachers sick pay for absences consistent with the amount of sick leave they have accrued. There is no other contract or language in the Agreement that contradicts the language in the Agreement.[14] This clear and unambiguous language applies to all full-time teachers. There is no specific exemption implied or

[14] Post Briefs, the School District informed the undersigned Arbitrator that there was no coaching contract for the Grievant for the spring of 2006.

directly applicable to teachers performing extra-curricular activities such as coaching. If the parties had intended to exclude teachers of extra-curricular activities in this provision, they should have made this exception a part of it. There is also no evidence that they intended to have the extra-curricular exception during the negotiation process. In deed, it appears that the parties intended by their actions at least since 1985 to apply this provision to all teachers including coaches covered by the Agreement.[15] Absent a specific proscription, it would be unrealistic to apply any restriction to a specific subject area of a teacher's services. Thus, I conclude that the language in this Article is clear and unambiguous; and I, as an Arbitrator, am empowered to enforce it, even if the enforcement is harsh to one of the parties. Finally, even assuming arguendo that the language was ambiguous, past practice under the circumstances herein, would dictate payment [16]

In view of the foregoing, I conclude that the Grievant was entitled to receive payment for his absence during the spring of 2006 track season due to his medical condition covered pursuant to the Agreement. This payment, however, is not all- inclusive for the entire track season. When the Grievant resigned his coaching position, he forfeited any payment thereafter, as he was no longer engaged in coaching by his own decision.

[15] The two coaches that the Employer cited as not being paid for services while absent are not dispositive of another intent. The nature of their absences is not known or whether the absences were even encompassed by the sick leave provision of the Agreement. Finally, as stated earlier, the Union had no knowledge of these non-payments.

[16] Although a past practice argument is normally precluded by a "zipper clause", it is relevant evidence in contract interpretation.

AWARD

The grievance is hereby sustained and,

IT IS HEREBY ORDERED that the Grievant be compensated for his coaching services commencing at the end of the payroll period for which he was compensated until he resigned his coaching position.[17]

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: June 22, 2007

Richard R. Anderson, Arbitrator

[17] The cut-off date for back pay will be the last payroll period ending closest to the middle of the month (May 16, 2006) unless an exact date of the resignation is established.